IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

WEDNESDAY, THE 4TH JULY 2007 / 13TH ASHADHA 1929

Mat.Appeal.No. 87 of 2007()

OPHMA.2439/2005 of FAMILY COURT, NEDUMANGAD
.....

PETITIONER: APPELLANT/PETITIONER

DR. A.REKHARANI, D/O. RANGAN,
RESIDING AT AMBIKALAYAM, NO.39, P.T.P.NAGAR(EAST),
THIRUVANANTHAPURAM.

BY ADV. SRI.R.SUDHIR

RESPONDENTS: RESPONDENT

K.C.PRABHU, S/O. K.CHANDRASEKHARAN,
PLOT NO.23, 2ND STREET, P & T NAGAR,
MADURAI-625 017, NOW RESIDING AT SITE 24,
K.CHETTIPPALAYAM, AIBEA NAGAR, BANK COLONY,
DHARAPURAM ROAD, TIRUPUR.

BY ADV. SRI.D.SAJEEV

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 6.6.2007, THE COURT ON 04/07/2007 PASSED THE FOLLOWING:

KURIAN JOSEPH & T.R.RAMACHANDRAN NAIR, JJ.

Mat.Appeal No.87 of 2007

Dated 4th July, 2007.

J U D G M E N T

Kurian Joseph, J.

Whether a power of attorney holder is entitled to present a petition for dissolution of marriage by a decree of divorce by mutual consent under Section 13B of the Hindu Marriage Act, 1955 is the interesting question arising for consideration in this case. The marriage between the appellant and the respondent was duly solemnized on 29.10.2001. After three years, on the grounds of illicit relationship with another person, and cruelty, the appellant filed O.P.(HMA) No.1470/04 before the Family Court, Thiruvananthapuram (later transferred to the Family Court, Nedumangad) seeking a decree of divorce under Section 13(1)(i) and (ia) of the Hindu Marriage Act. In the meanwhile, the appellant left for Gulf. However, she executed a power of attorney, appointing her father as the power of attorney holder to prosecute the case before the Family Court. According

to the appellant, O.P.(HMA) No.1470/04 was got dismissed as not pressed on 17.12.2005 and on the same day, a joint petition for dissolution of marriage by mutual consent was filed under Section 13B of the Act. The appellant was represented through the power of attorney holder and the respondent appeared in person. The Family Court took the statements of the appellant's father, the donee of power of attorney, and the respondent-husband on the same day and by order dated 20.12.2005, a decree was passed dissolving the marriage by a decree of divorce by mutual consent. At the risk of redundancy of the factual matrix, in order to appreciate the stand taken by the Family Court, it is necessary to extract two paragraphs from the judgment under appeal, which read as follows :-

> "4. The statements of both the Power of Attorney Holder of the 1st petitioner and the 2nd petitioner were recorded. Their statements show that petitioners 1 and 2 got legally married on 29.10.2001 and thereafter they resided together as husband and wife and that due to incompatibility of temperaments they are residing separately from 16.7.2004 onwards. The statements also show that the petitioners have decided to dissolve their marriage by mutual consent and that their decision is not vitiated by fraud, collusion, undue influence or mis-representation. It is also clear that the marital tie is irretrievably broken and it is practically and emotionally dead and that there is no chance for any re-union. Hence the statutory requirement of waiting for a period of 6 months is waived. No children were born in the wedlock. All financial matters between the parties are settled.
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> 5. The marriage has been broken down and the parties

> can no longer live together as husband and wife. In the circumstances the life of the spouses shall not be allowed to put in perpetual agony and despair. Hence it may be better to bring the marriage to an end. Therefore, the O.P. is allowed." (emphasis supplied)

2. According to the appellant-wife, she met the respondent on several occasions at Thiruvananthapuram in the meanwhile and she has not given consent for a divorce. It is also contended that the procedural requirements have not been satisfied. Hence the appeal.

3. Section 13B of the Hindu Marriage Act, 1955 reads as follows :-

> "13B. Divorce by mutual consent.--(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.
>
> (2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnised and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."

The court gets jurisdiction to consider a petition under Section 13B of the Act for divorce by mutual consent, only if a petition for that purpose is presented to the court by both the parties to the marriage together. The parties to the marriage referred to in Section 13B are the husband and wife only. They have to present the petition themselves for dissolution of their marriage by a decree of divorce by mutual consent to the court together. The grounds available to the parties on such a petition are; (1) the husband and wife have been living separately for a period of one year or more and (2) they have not been able to live together and that they have mutually agreed that the marriage should be dissolved. If the petition is not withdrawn by the parties within 18 months, they may move the court after six months of the presentation of the petition, but before 18 months. Thereafter, the court has to conduct appropriate inquiry to enter a satisfaction that consent was not obtained by fraud and that there is no collusion between the parties. The period of minimum six months' time is given in divorce by mutual consent, to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. The mutual consent should continue till the divorce decree is passed. The court

should be satisfied about the bona fides and consent of the parties. If the court is held to have the power to make a decree solely based on the initial petition, it negates the whole idea of mutuality, as held by the Supreme Court in **Sureshta Devi v. Om Prakash** (AIR 1992 SC 1904). There has to be a lie over period, a transitional period; the purpose of such period is to give time and opportunity to the parties to have sound and mature reflections on their move.

4. Whether such a petition can be presented through the power of attorney holder of the party to a marriage and whether the court can enter a satisfaction regarding the areas required for a decree of divorce by mutual consent is the further question to be considered.

5. The Supreme Court in **Janki Vashdeo v. Indusind Bank** [2005(2) KLT 265 (SC)] also has reiterated that a power of attorney can give evidence only in respect of acts done by him in the exercise of powers granted by the instrument, but he cannot depose for the principal in respect of the matter on which the principal alone can have personal knowledge. It was also held therein that the power of attorney ...”cannot depose for the principal in respect of the matter which only the principal can

have a personal knowledge and in respect of which the principal is entitled to be cross-examined." A Division Bench of this Court in **Ummer Farooque v. Naseema** (2005(4) KLT 565), on a question as to which sect a party to a marriage belongs to, held that "Power of Attorney can give evidence only in respect of acts done by him in the exercise of powers granted by the instrument, but he cannot depose for the principal in respect of the matter on which the principal alone can have personal knowledge." In **Ratheesh Kumar v. Jithendra Kumar** (2005(2) KLT 669) in the matter arising under the Buildings (Lease and Rent Control) Act, 1965, another Division Bench of this Court held that "A general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff. The power of attorney holder of a party can appear only in his personal capacity and cannot appear on behalf of the party in the capacity of that party." Thus the law is well settled that in matters requiring personal knowledge, evidence cannot be adduced through a power of attorney.

6. The extracted portions from the judgment under appeal would show that the power of attorney holder of the appellant wife has deposed regarding the emotional

incompatibility of temperaments between the wife and the husband. The power of attorney holder has also further deposed that the wife and husband have decided to dissolve their marriage by mutual consent and that the decision is not vitiated by fraud, collusion, undue influence or misrepresentation. Still further, it is deposed that the marital tie between the wife and husband is practically and emotionally dead and that there is no chance for union. It needs no further discussion to hold that those are matters requiring personal knowledge and in such matters, the evidence cannot be tendered through the power of attorney holder. It is significant to note that in this case the wife herself has stated in the appeal that in the meanwhile the husband and wife met together on many occasions. If that be so, certainly the court lacked jurisdiction to grant the decree as the pre-conditions are not satisfied. Not only that, under Section 13B of the Act, a petition for dissolution of marriage by a decree of divorce by mutual consent is to be presented by the parties to the marriage and not through the power of attorney holder. They should satisfy the court that as on the date of presentation of the case that they had not been living together as husband and wife for more than one year, that they have not been able to live

together and that they have mutually agreed for the dissolution. If after presentation of the petition, during the lie over period the parties have met and lived as husband wife, they are not entitled to the decree for dissolution. The court on motion after the lie over period has to satisfy that the parties had not been living together as husband and wife, at least for one year prior to the presentation of the petition, they are not able to so live together even after the presentation of the petition, and that they have not actually so lived during the lie over period either. The court should also satisfy that the mutuality on consent persisted in both the parties during the lie over period. If one party has change of heart or second thought in the meanwhile, the court has no jurisdiction to grant the decree for dissolution. The endeavour of the court should be as far as possible to sustain and nurture the institution of marriage. The approach made by the Family Court in the instant case is patently erroneous and it is casual too. The inquiry by the Family Court should be with the parties to the marriage, regarding the essential ingredient for a decree of divorce by mutual consent under Section 13B of the Hindu Marriage Act.

In the result, the judgment in O.P.(HMA) No.2439/05 on

the file of the Family Court, Nedumangad is set aside and the appeal is allowed.

KURIAN JOSEPH, JUDGE.

T.R.RAMACHANDRAN NAIR, JUDGE.

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KURIAN JOSEPH &

T.R.RAMACHANDRAN NAIR, JJ

L.A.A. NO. OF 2004

J U D G M E N T

Dated , 2007.